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Consent To Settle? A New Twist In The tr-Partite Relationship

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CONSENT TO SETTLE?
A NEW TWIST IN THE TRI-PARTITE RELATIONSHIP

By: David F. Tavella

The tri-partite relationship between insurers-insureds-retained counsel has existed for decades, but also has often been marked with conflicts and pressure. Overall, however, the system works.¹ Insurers provide a defense to its insureds, and retains defense counsel with which it usually has a longstanding relationship in order to control defense costs and ultimately lower premiums.² One of the key elements of this relationship is that the insurer controls the litigation. While the insured is the client of the retained counsel, the most significant aspect of any litigation, whether to settle, is controlled by the insurer pursuant to the policy of insurance.³

This system has been hampered by the introduction of the revised Model Rules of Professional Conduct, which are being adopted by more and more states.⁴ The Model Rules places the decision to settle squarely and exclusively with the attorney’s client, the insured. This can create a significant conflict for defense counsel in any litigation that is being defended pursuant to a policy of insurance, and may create difficulty for plaintiffs who wish to settle a case. Most

¹ The terms “insurer” and “carrier” are often used interchangeably by courts, and will both be used in this article to represent the entity that provides the policy of insurance to its insured.
⁴ New York is the latest stated to adopt the Model Rules, effective April 1, 2009.
significantly, defense counsel may face ethical charges because of what is common practice: settling a case on instruction of the insurance carrier.

The typical commercial general liability (CGL) policy provides coverage to millions of individuals, small business and large businesses throughout the country. The language of the policy governs the obligations of the insurer and insured. Most attorneys are familiar with an insurer’s duty to defend, a duty that arises directly out of the language of a typical CGL policy. The typical policy provides that the insurer has “the right and duty” to defend an insured against any suits seeking damages. Of course, the same paragraph continues by stating: “We may, at our discretion, investigate any “occurrence” and settle any claim or “suit” that may result.”

Thus, the same paragraph that creates the duty to defend gives the insurer the absolute right to settle any case, regardless of the wishes of its insured.

**Relationship Between Insured and Retained Defense Counsel**

The relationship between attorney and client had been addressed in Disciplinary Rule 7-101: The attorney is to represent a client zealously. In vague terms, the rule simply stated that a lawyer shall not intentionally fail to seek

7. See typical CGL policy at section 1 – Coverage A bodily injury and property damage liability (1)(a).
8. DR 7-101 Representing a Client Zealously
   (a) A lawyer shall not intentionally:
      (1) Fail to seek the lawful objectives of the client through reasonably available means permitted by law and the Disciplinary Rules.
the lawful objectives of the client.\(^9\) There was no specific language regarding settlement. However, the Model Rules of Professional Conduct directly address the question of settlement. Rule 1.2 states: “A lawyer shall abide by a client’s decision whether to settle the matter.”\(^10\) Thus, in clear and unequivocal language, the disciplinary rules require an attorney to abide by the client’s wishes, regardless of what the client’s insurer may wish, and notwithstanding the language of the policy.

This article examines the interplay between the insured’s right to consent to settle a case within the context of the Model Rules and an insurer’s right to settle without the insured’s consent, potential issues that will arise regarding settlement, and an attorney’s ethical duty to the client.

**INSURED-INSURER RELATIONSHIP**

The relationship between an insurance carrier and its insured is governed by the policy, together with various statutes addressing this relationship and court decisions interpreting policies. Fundamentally, however, an insurance policy is a contract and governed by its terms and conditions.\(^11\)

The basic terms and conditions of any CGL policy provide, with few variations, as follows:

\(^9\) Id.
\(^10\) Model Rules of Professional Conduct Rule 1.2.
SECTION I - COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

   a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend for “bodily injury” or “property damage” to which this insurance does not apply. We may, at our discretion, investigate any “occurrence” and settle any claim or “suit” that may result.\(^\text{12}\)

Thus, the right of an insurance company to settle a case goes hand in hand with its duty to defend. This situation was analyzed over twenty years ago in *Feliberty v. Damon.*\(^\text{13}\) In *Feliberty*, an insurer settled a case brought against its insured, a physician (the policy did not have a consent to settle clause).\(^\text{14}\) After the insurer settled the case, the insured brought a legal malpractice case against the insurer because the settlement was made without his knowledge. While part of the case dealt with whether an insured could hold an insurer liable for legal malpractice of the retained attorneys, the court began by noting that the policy

\(^{12}\) ISO form CG 00 01 07 98. Some policies, notably medical malpractice policies, include a consent to settle provision in the policy. However, the typical CGL policy usually does not have a consent to settle provision.

\(^{13}\) 129 A.D. 2d 207 (4th Dept. 1987).

\(^{14}\) *Id.* at 210. A consent to settle clause gives the insured the ultimate decision whether to settle a case.
gave the insurer the right to settle the case without the insured’s consent.\textsuperscript{15} The court noted that the policy provided that the insurer may make such investigation and settlement of any claim as it deems expedient. As noted by the court: “Such language in the policy gives a carrier the right under that contract to settle an action on behalf of the insured with or without the insured’s consent.”\textsuperscript{16} While the court noted that an insurer must respond to inquiries from its insured regarding the status of a case, the court held that an insurance carrier is not obligated to consult its insured with regard to the settlement.\textsuperscript{17} Also, the court noted that it is certainly not a breach of the insurer’s good faith when an insurer settled a case within the policy limits contrary to the wishes of the insured.\textsuperscript{18}

The court examined at least one motivation of the carrier:

Defendant asserts that its decision to settle avoided the possibility of an unfavorable ruling on appeal that might result in a new trial with the unintended risk of a judgment in excess of the previous verdict and the policy limits, thereby exposing the insured (plaintiff) to personal liability. Thus, although we can well appreciate Dr. Feliberty’s desire to pursue an appeal to vindicate himself and his professional reputation, MMIA, under the terms of the insurance policy, had an absolute right to settle the action as it deemed expedient, with or without his consent. The exercise of that contractual right obviated the necessity of pursuing any appeal.\textsuperscript{19}

\textsuperscript{15} \textit{Id.}
\textsuperscript{16} \textit{Id.} at 210 (citations limited).
\textsuperscript{17} \textit{Id.}
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} \textit{Id.} at 210.
Avoiding an appeal or a potential verdict in excess of the demand is one reason a carrier may settle.\textsuperscript{20} Another is to avoid excess defense costs.\textsuperscript{21} If a case can be settled early in litigation for a nominal amount, thus avoiding tens of thousands in defense costs, it is certainly adventitious to the carrier, and may be the reason why a carrier accepts the absolute obligation to defend the case. Requiring a carrier to defend the case without permitting it to settle the case would place a carrier in an adverse position. It would be in a position of spending tens of thousands of dollars, or even hundreds of thousands of dollars, defending an action, and as well as being subject to verdicts up to its policy limits, based upon the clients refusal to settle, regardless of any good faith basis for the insured’s reasoning. Thus, a carrier’s right to settle a case in a necessary corollary with its duty to defend.

This is not to say, however, that an insured’s refusal to settle cannot be made in good faith. There may be reasons, i.e., personal reputation or a belief that the plaintiff is faking, why an insured may not settle.\textsuperscript{22} However, an insured gives up that right vis-à-vis the carrier when it takes out a policy that requires a carrier to defend a case at the carrier’s expense.\textsuperscript{23}

\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} See, \textit{Mitchum v. Hodgens}, 533 So. 2d 194 (Ala. 1988).
\textsuperscript{23} The right is not absolute. Some states require the settlement to be made in good faith after investigation. \textit{Id.}; Bleday \textit {v. OUM Group}, 435 P. Super. 395 (1994); \textit{Shuster v. South ___ Hospital}, 591 So. 2d 174 (Fl. 1992).
The new rules place the retained counsel in a precarious situation. Counsel, although representing its client (the insured), gets paid and takes direction from the carrier. If a carrier wishes to settle a case, but the insured refuses, the retained defense counsel is placed in the middle of the conflict between his client and his source of payment. While the retained counsel could seek to withdraw, any other attorney retained by the carrier would be faced with the same situation.

There have been numerous articles written about the relationship between and insured, an insurer, and the attorney hired by the insurer to defend the insured. These primarily deal with whether the attorney has two clients, the insured and the insurer, and whether the attorney’s duty is solely to the insured.\textsuperscript{24} For the purposes of this article, it does not make a difference as to whether a dual client relationship is accepted. However, I will address some of the issues involved.

The definitive article regarding this issue was written by professors Charles Silver and Kent Syverud.\textsuperscript{25} This article has been cited no less than 160 times in cases, administrative materials, other law review article, court documents and expert testimony. As Silver and Syverud point out, the relationship between the insured and the attorney, in addition to being derived from the policy, is


controlled by the retainer agreement. Silver and Syverud argue that the policy and the retainer agreement “bleed” into each other. Silver and Syverud argue that both the carrier and the insured can be a client, it all depends on the retainer agreement.

Silver and Syverud continue by arguing that an attorney’s duty to the client is limited to what is specifically set forth in a retainer agreement. This proposition arguably has some support from the case of Shaya B. Pacific v. Wilson Elser Moskowitz Edelman & Dicker, LLP, a New York case involving the scope of responsibility of defense counsel hired by Shaya B. Pacific’s insurance company to defend the insured, Shaya B. Pacific, in a personal injury action. The policy limit was $1,000,000. The underlying plaintiff was seeking damages of $52,500,000. A representative of the primary carrier that retained defense counsel wrote to the insured advising the insured that the amount sought was in excess of the policy limit and that the insured may wish to engage counsel of their choice at its own expense to act on its behalf regarding any potential excess judgment. After summary judgment was awarded to the underlying plaintiff, defense counsel tendered the case to the excess carrier. The excess carrier declined coverage based upon late notice of the action. In the underlying

\[26 \text{ Id. at page 270.} \]
\[27 \text{ Id. at 309.} \]
\[28 \text{ Id. at 289-290.} \]
\[29 \text{ Indeed, Model Rule 1.2 provides that a lawyer may limit the scope of the representation “if the limitation is reasonable under the circumstances”…RN Model Rule 1.2} \]
\[30 \text{ 38 A.D. 3d 34 (2d Dept. 2006).} \]
action, the plaintiff obtained a judgment of $5,694,320, and his wife obtained a judgment on a derivative claim of $795,000. The insured then commenced a legal malpractice claim against the law firm. The law firm moved to dismiss, arguing that they had no obligation to notify the insured’s excess carrier.\textsuperscript{31}

The court began by noting that the letter from the primary carrier failed to conclusively establish that the scope of the firm’s representation was limited.\textsuperscript{32} While the court emphasized that this was in response to a motion to dismiss, not one for summary judgment, the court seemed to imply that a representation letter or retainer agreement can limit the scope of representation by defense counsel.\textsuperscript{33}

The court then went to the central question of the case. “Whether a law firm obtained by a carrier has any duty to ascertain whether the insured it was hired to represent has available excess coverage or to file a timely notice of excess claim on the insured’s behalf.”\textsuperscript{34} In their examination, the court asked whether, under ordinary circumstances, an attorney retained directly by a defendant in a personal injury action would be under an obligation to investigate the availability of insurance coverage for its client, and to see that timely notices of claim are

\textsuperscript{31} Id. at 40.
\textsuperscript{32} Id. at 38-39.
\textsuperscript{33} Id. at 38. (“In light of these standards, and considering the circumstances of the cause and the arguments addressed by the parties, the defendant’s law firm would be entitled to dismissal pursuant to CPLR 3211(a)(q), if it could be established either that the letter dated January 25, 2001, conclusively proved that the scope of its representation never even passed any responsibility with respect to possible excess coverage…
\textsuperscript{34} Id. at 40.
An ancillary question was whether, if such an obligation exists, whether this obligation also binds an attorney who is retained to defend a personal injury action by defendant’s carrier.\textsuperscript{36}

To answer the first question, the court noted that whether an attorney can be found negligent for failing to investigate insurance coverage would turn primarily on the scope of the agreed representation.\textsuperscript{37} The question is whether the attorney failed to exercise the reasonable skill and knowledge commonly possessed by a member of the legal profession regarding this issue.\textsuperscript{38} The court, based upon the letter from a carrier, could not answer the question as a matter of law, and thus held that it was a question of fact for a jury.\textsuperscript{39}

The court then analyzed whether the same duty would apply to a defense counsel hired by a carrier.\textsuperscript{40} The court noted that the carrier’s main interest was keeping the verdict as low as possible, and below the policy limits.\textsuperscript{41} The carrier had no interest in whether excess coverage was available.\textsuperscript{42} The court recognized that a conflict may have arisen had the issue concerned the scope or nature of coverage, but because the carrier had no interest in the existence of excess

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Id. at ___.
\item Id.
\item Id. at 41.
\item Id. at 41.
\item Model Rules of Profession Conduct Rule 1.2.
\item Id.
\item Id. at 42-43.
\end{enumerate}
\end{footnotesize}
coverage, no conflict existed. The court noted that it was unprepared to say whether, as a matter of law, defense counsel hired by a carrier had any obligation regarding excess coverage.

On the surface, it appears that *Shaya B. Pacific* supports Silver and Syverud’s argument that representation can be limited pursuant to retainer agreement. However, an important distinction to note is that the question in *Shaya B. Pacific* dealt with excess coverage. It did not deal with what may be considered ordinary aspects of litigation, such as settling a case, and performing those functions relating to settlement, such as signing and filing of the settlement documents.

Silver and Syverud argue that an attorney’s scope can be limited. For example, an attorney’s scope of representation can include everything except settlement obligations. This is unworkable in the real world.

First, Silver and Syverud are arguing that an attorney could do everything to properly defend a case, but when it comes to the most important part of the case short of trial, settlement, they should abandon their client. This would have significant ramifications regarding settlement of cases.

While Silver and Syverud argue, the insured should get their own attorney to advise about settlement, many insureds are individuals or small business. The

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43 Id.
44 Id. at 43.
45 Silver and Syverud at page 299-300.
reason why they have insurance is because they cannot afford or do not want to pay for their own attorney. Under the Silver and Syverud’s argument, any time an insured has an issue of settlement, they must pay out of their own pocket in order to merely get advice regarding a proposed settlement. This is unworkable and goes against the very reason to obtain insurance.  

An attorney is often obligated to give advice, and merely giving advice does not necessarily create a conflict of interest. Regarding settlement, there is much advice an attorney can give without creating a conflict. Most significantly, the attorney could be prohibited from advising whether to accept the settlement, but the attorney can provide advice as to the consequences of not settling, and the pluses and minuses of the case, etc. In addition, the attorney would be in the best position to advise as to exposure. Retained defense counsel, who has defended the insured throughout the litigation, is in the best position to advise as to the strength of plaintiff’s case, possible defenses, and value of the case. Defense counsel has viewed the witnesses, and is most familiar with all aspects of the case. Defense counsel should be able to advise as to the value of the case, and whether a defense verdict is likely, without creating a conflict.

Significantly, Silver and Syverud’s proposal would essentially prevent the attorney of record even from assisting and settling the case by reviewing the release and signing the stipulation of discontinuance. Again, when an insured

46 Indeed, liability insurance has often been referred to as “litigation insurance” because it protects the insured from all aspects of litigation.
most needs its attorney, Silver and Syverud argue that the attorney should abandon their client to the client’s own devices. This is unworkable, and “unreasonable under the circumstances.”

Silver and Syverud recognized that their proposal, particularly dealing with settlement, is controversial, and subject much criticism.

There should be nothing to prevent, and indeed it should be encouraged for, the attorney of record to review the release and settlement documents. There is no conflict of interest in assisting the settlement if the carrier insists on settling the case, as it is their right under the policy of insurance. However, this assistance would be prohibited by the newly adopted Model Rules.

If the insurer insists on settling the case, but the client refuses to settle, it is not in the client’s best interest to have the insurer settle the case anyway, without the input of the attorney representing the insured. The attorney could merely review the release to ensure his client is thoroughly protected. An insurer has no incentive to protect its insured following settlement, only itself. Therefore, it is advisable to have the attorney of record be able to review settlement documents, even if the client absolutely refuses to settle, and at the same time avoid any ethical problems pursuant to the Model Rules.

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47 See Model Rule 1.2.
48 Silver and Syverud at 302.
49 Model Rules 1.2.
A simple recitation of the facts relevant to settlement, or to ensure the insured’s protection if the insured settles without the insured’s consent, would not create a conflict. These facts would include policy and coverage considerations; defenses to the claim; potential damages; the chance of success at trial; and defense costs if the insured insists on continuing the defense without the carrier’s input. These are facts, not opinion, and the mere representation of facts would not create a conflict of interest. Ethical considerations, rules, and retainer agreements would not prevent unethical attorneys from acting as such. However, there must be a presumption that attorneys will act ethically when advising their client as to facts.

POSSIBLE SITUATIONS

When a carrier and an insured are in conflict as to whether to settle, this could create a situation where the attorney is essentially placed on the middle of the tug-of-war between his client (the insured) and the carrier.

There are three potential problems that could arise from the conflict between the rules and the requirements of an insurance policy. First is when the carrier settles directly with the plaintiff. (The insured has consented to the carrier settling the case by virtue of the policy condition). The settlement would be valid

50 This presumes, of course, that the attorneys would abide by the ethical obligations to accurately state the facts and not distort the facts in favor of the carrier.
as against the plaintiff.\textsuperscript{51} However, the question is the impact the settlement would have on the attorney who was hired by the carrier. Clearly, the insured is the attorney’s client. Therefore, the attorney must abide by his client’s wishes. However, the attorney is being retained pursuant a contract between the insured and the carrier. The question is how these relationships interact.\textsuperscript{52}

A second possible situation is that the carrier will withdraw from defending the insured, leaving the insured with potential uninsured exposure. If the carrier withdraws, the defense counsel retained by the carrier will most likely also seek to withdraw. Even if defense counsel remains and continues to defend the insured, the insured would have to pay for this defense with its own money. Also, a question arises as to who would pay any settlement and/or verdict. The insured may be required to pay anything over what a carrier could have settled if they had the insured’s consent, and most carriers would probably argue that the insured should pay the entire amount of verdict because the insured failed to abide by the terms and conditions of the policy, namely the consent to settle clause. Whatever the ultimate outcome, this issue could delay payment to the injured party, and increases litigation costs on all sides.

\textsuperscript{51} Fiese v. Cooke, 125 Cal. App. 4\textsuperscript{th} 1350 (2d Dist. Div 1, 2004); Koval v. Simon Telelect, Inc., 693 N.E. 2d 1299 (In. 1998).

\textsuperscript{52} Rogers v. Robson, Masters, Ryan, Brumund and Belom, 74 Ill. App. 3d 467 (App. Ct. 3d Dist. 1979).
The final problem is that of attorney discipline. The contract of insurance provides that the insured has given up the right to settle, but that may not impact the attorney’s obligation to its client.

For example, if the attorney assists in preparing the closing papers when the carrier settled directly with plaintiff, can the attorney then be disciplined for failing to abide by the client’s wishes as to whether to settle? These types of questions must be answered.

**CARRIERS RIGHT TO SETTLE**

The first possible situation is that the carrier will notify the insured that, pursuant to the policy, the carrier has a right to settle. This is a right the insured gives to a carrier in the policy, and has generally been upheld by the courts.\(^5^3\)

The carrier may settle the case without the involvement of counsel. The carrier can make an agreement directly with the plaintiff, something that is fairly common in “settlement days” where carriers try to settle many low value cases at one time. While the insured may protest, a carrier has the contractual right to settle the case.\(^5^4\)

Another possible situation is that the carrier will advise the insured that the carrier will no longer defend or pay for defense counsel, and any future settlement and/or jury award will only be paid by the carrier to the amount that it could have settled the case. Thus, if the carrier can reach a settlement of $100,000 early in

\(^{53}\) Fiese, supra.

\(^{54}\) Id.
the litigation, and the verdict returns at $1,000,000, the insured will face $900,000 uninsured exposure. Any court, however, would critically view this situation, and the ultimate outcome may not be satisfactory to either party. Also, how this would impact retained defense counsel remains to be seen.

**CARRIERS WITHDRAWS**

A carrier may also disclaim coverage based upon the client’s failure to cooperate in the defense of the action, or for violation of the settlement clause. This will leave the client facing uninsured defense costs, and uninsured exposure. This situation will likely face close court scrutiny. Whether a carrier can unilaterally withdraw would be looked at closely by courts.\(^{55}\)

The Model Rule will make settlements more difficult. The Rule will likely increase the number of declaratory judgment actions against carriers, malpractice actions against defense counsel, and supplemental litigation regarding the settlement. While any settlement will likely be affirmed\(^ {56}\) the subsequent litigation will unequivocally create a conflict between the client (insured) and defense counsel. Innocent defense counsel will be placed in a situation defending

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its actions, and perhaps attacking its former client. This would likely lead to further litigation and additional costs for all parties concerned.

ATTORNEY DISCIPLINE

In addition to increased litigation and cost to all parties, defense counsel may face discipline and/or claims of malpractice based upon any settlement reached without the consent of its insured. Unanswered questions are whether the defense counsel has to affirmatively receive consent to settle, or whether it would only be considered a violation of the disciplinary rules if the attorney actually goes against the client’s affirmative statement that it does not want to settle.57 The new rule does not elaborate: it only states that the attorney should abide the client’s decision.58 Either way, defense counsel must be aware that it may face disciplinary action or malpractice claims if it takes part in a settlement arranged by its carrier against the wishes of its client, or if counsel receives no direction from the client.

Decisions dealing with this issue primarily deal with plaintiff’s attorneys settling a case without its client’s consent, coupled with other disciplinary violations, most commonly lack of communication and not immediately turning over the settlement funds. Cases addressing disciplinary action against a defense counsel settling a case without a client’s consent are difficult to find.

58 Model Rules 1.2.
Insureds have attempted to bring malpractice and/or bad faith claims against the insurers that settle without consent. These attempts are generally unsuccessful.\textsuperscript{59}

A carrier has a good argument that it can withdraw from defending an insured that refuses to settle, or can settle a matter regardless of the insured’s desire.\textsuperscript{60} This could greatly impact insureds that did not receive adequate advice, or ignored advice, regarding the potential consequences of withdrawal by the insurer. In addition, as noted above, carriers can argue that any obligation for defense and indemnity has been waived because of the insured’s violation of the settlement clause. Therefore, an insured may face complete uninsured exposure if it takes this route.

The short-term problems will be cases being more difficult to settle. There will be cases where the carrier wants to settle the case, but the insured refuses. Also, there will be cases where defense counsel does not know the client’s decision. Later litigation regarding settlements, or the failure to settle cases, will work there way to the lower courts and appellate courts.

Until such time as the courts give guidance on this issue, attorneys must be aware of these situations and tread lightly. In addition, courts must recognize the


\textsuperscript{60} \textit{Hurvit v. St. Paul Fire and Marine Co.}, 109 Cal. App. 4\textsuperscript{th} 918 (Ct. App. 2d Dist. Div. 4, 2003); \textit{Marginian v. Allstate Ins. Co.}, 18 Ohio St. 3d 345, 481 N.E. 2d 600 (1985).
potential problems in the early cases arising from these situations. Courts should not overly penalize attorneys making good faith efforts to comply with the rule, comply with its client’s wishes, and comply with the carrier’s wishes.

Simply put, an attorney may face disciplinary action if it violates disciplinary rules. One of the disciplinary rules is that an attorney must abide by his/her client’s decision on settling. An attorney that does not abide by a clients refusal to settle may face disciplinary action.\textsuperscript{61} The specific details remain a mystery.

**DOES INSURED’S AUTHORIZATION TO INSURER EQUAL PERMISSION TO ATTORNEY TO SETTLE A CASE?**

The new Model Rules require that an attorney abide by its client’s direction whether or not to settle the case. As demonstrated throughout this paper, this could lead to conflicts between the attorney and client, and between the client and the insurance company. However, the client has already given direction regarding settlement. That is, the insured has agreed to permit the insurance company to determine whether to settle this case.

The question is whether that agreement could be applicable to the insured-defense attorney relationship. The insureds decision to permit the carrier to

decide makes the settlement valid as against the plaintiff.62 There is simply no reason not to expand this rationale in determining, for ethical considerations, that the client has made a decision regarding settlement, and has given the carrier the option to settle the case.63

Generally, a client’s decision whether to settle a case is revocable.64 However, regarding a case being defended pursuant to an insurance policy, the only way to revoke that decision is to, in essence, revoke the insurance policy. Thus, the defense counsel who is retained by an insurance company would no longer have the obligation to defend the client and could withdraw the case.

Permitting the insured’s decision to give the carrier the ultimate decision whether to settle to apply to defense counsel’s ethical obligations would remove any obstacle in the way of the attorney assisting in reviewing and filing of the settlement documents. Again, as described in detail above, the defense counsel would not give advice regarding whether to settle. However, the decision by the insureds to permit the carrier to decide whether to settle the case would insulate

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63 See, Teague, M.D. v. St. Paul Fire and Marine Ins. Co., 10 So. 3d 806, 835 (La. App. 1 Cir. 2009). (“We believe that the insurance contract does affect the attorney-client relationship with respect to settlement of an action brought against an insured. If the insured has contracted away the right to require his consent prior to a settlement of a claim against him, no real conflict of interest exists between the insured and insurer, at least where the claim or settlement is without policy limits and there has been no reservation of rights by the insurer,” quoting, Mitch v. Hudgens, 533 So. 2d 194 (Ala. 1988).
the attorney from any ethical problems if the attorney merely assisted in reviewing and submitting the final papers after the carrier has settled the case.

As noted, generally a carrier’s decision to settle the case is binding on the insured.\(^{65}\) An insured can make a decision not to settle the case, but would have to repudiate the insurance policy. This would lead the carrier to cease defending the case, and thus cease to pay defense counsel. The defense counsel then can make a deal wherein the insured would pay them, or would seek to be relieved for non-payment. If defense counsel continues to defend the insured, after being paid by the insured, then, of course, the insured would have the ultimate decision to settle the case. If defense counsel withdraws, any potential conflict would cease.

Automatic withdrawal by defense counsel would only place added burdens on the insured, defendant in the action, to hire its own attorney to merely review whether to settle the case. If a decision is ultimately made to settle the case, this would create additional costs on the defendant, and additional delay in the court system. Therefore, it is unrealistic to require defense counsel to either withdraw immediately upon the potential conflict between the carrier and the insured, or to remain mute regarding possible settlement.

There will always be conflicts between a defendant and his attorney regarding the strategy and tactics of a case.\(^{66}\) For example, whether the best trial strategy is to concede liability or what witnesses to call will always be a source of

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\(^{65}\) See footnote 57.

contention.\textsuperscript{67} This is true whether counsel is hired directly by a defendant or by an insurance company. While sometimes these conflicts cannot be resolved, and the attorney must withdraw, often these conflicts are easily resolved. A client often delegates authority, including authority to settle, to others.\textsuperscript{68} However, this delegation is revocable.\textsuperscript{69} As noted above, the only way to revoke the authority to settle given by a carrier is to repudiate the policy. This will, in essence, end any conflict the attorney has because the carrier would no longer be defending the insured.

This is true for other tactical decisions. Generally, a carrier has the right to control the litigation, including, for example, conceding liability, determining experts to hire, etc. The only way for the client to stop the carrier from exercising this authority is to repudiate the policy. If the client does not accept the decision, the client would have to request that the carrier no longer defend them in the case. This would end all conflicts. Thus, in reality there is no conflict with the defense attorney. Defense counsel could state their reasons for the tactical decisions, and it is still up to the client whether to accept the decision. Since defense counsel will no longer be getting paid by the insured, defense counsel would be free to either observe their client’s wishes, or to withdraw from the case.\textsuperscript{70}

\begin{footnotes}
\textsuperscript{67} Id.
\textsuperscript{68} Fisher at 41.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\end{footnotes}
The Model Rules require an attorney to abide by its client’s wishes, specifically regarding settlement, but also with decisions regarding the objectives or representation. In the tri-partite relationship between an insurer-defense counsel - insured, the client, the insured, has already contractually given the right to control litigation and to settle the case to the insurer. Therefore, an attorney abiding by the directives of the insurance company is abiding by his client’s wishes. If the client repudiates the policy to take back tactical control on settlement authority, any potential conflict would end. The attorney could continue to defend the action being paid directly by the client, or seek to withdraw because the client has repudiated the insurance policy.

CONCLUSION

The only conclusion to be reached is that there will be significant confusion in the next few years. While this issue will not arise in a significant majority of cases, there will be cases where conflicts arise between client’s desire for vindication and clearing of his good name, with the carrier’s desire to keep costs down and protect itself from excessive verdicts. This issue can arise despite both the insured and the insurer acting in good faith. Defense counsel will be in the middle, trying to resolve this dispute. At the same time, defense counsel must be aware of its own reputation and its very ability to practice law, subject to

71 See Model Rules 1.2.
possible suspension for the violation of the disciplinary rules, as it seeks to walk
the minefield created by the new rules. It is not a question of if this issue will
arise and cause problems, but when.

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